In the High Court of Uttaranchal, at Nainital.

Chapter VIII, Rule 32 (2) (b)
Description of Case.

Criminal Jail Appeal No. 393 of 2003

Ashok @ Sameer
Vs.
State
AND
Criminal Reference No. 03/2003

Date of decision 6th May, 2005

For the approval of :

Hon'ble Mr. Justice Irshad Hussain, J.

Hon'ble Mr. Justice Rajesh Tandon, J.

- Whether the order/judgment should be Sent for reporters for reporting? (Yes)

- Whether the reporters be allowed to See the judgment? (Yes)

ISB

In the High Court of Uttaranchal, at Nainital.

Criminal Jail Appeal No. 393/2003

Ashok @ Sameer S/o Khitiwine

R/o Sindhi Dugdh Bhandar, P.S. Kotwali

Haridwar ……..Appellant.

Vs.

State … Respondent.

AND

Criminal Reference No.03/2003

Sri S.P.S. Panwar, learned Senior Advocate,
Amicus Curiae for the appellant.

Sri Nandan Arya, leaned A.G.A. for the State.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble Rajesh Tandon, J.

Dated: 6th May, 2005.

(Per: Hon'ble Irshad Hussain, J.)

Appellant has been convicted and awarded death sentence under Section 302 I.P.C. per judgment and order dated 5.12.2003, passed by Additional Sessions Judge/ Ist F.T.C., Haridwar in Sessions Trial No. 143/1998.

2- Criminal reference under Section 366 of the Code of Criminal Procedure for confirmation of the sentence has been preferred.

3- Briefly stated the prosecution case was that on 14-8-1997 at about 7.15 A.M. Km. Deepa Bisht, while going to her school happened to pass by Jain Mandir Lane in front of Gurudwara of the town of Haridwar. Her father informant, Mahavir Singh and her brother Devendra Singh were then going towards market to make some purchases. As soon as Km. Deepa Bisht reached in the Jain Mandir Lane, appellant Ashok @ Sameer and his companion Rajan son of Mahendra appeared there and seeing her, Rajan (accused) asked the appellant Ashok to kill her as she had been instrumental in bringing disrepute for them. Consequent to this exhortation, appellant Ashok started giving kick and fist blows to Km. Deepa Bisht. Her father and brother

moved forward to rescue her but the appellant meanwhile took out a ice slabs breaking steel ‘Sua’ and started giving its blows on her person. Km. Deepa sustained serious injuries on her person. Hearing alarm witnesses Rajesh, Sita Ram and others also appeared at the scene of the incident. Km. Deepa Bisht was then shifted to the hospital in injured state by some persons who have assembled there but she was reported dead by the Medical Officer on arrival at the hospital.

4- It was also the case of the prosecution that few days before this incident appellant Ashok who was employed as a workman with Sindh Dugdh Bhandar had indecently teased Km. Deepa Bisht who has reported the matter to her father and appellant was then scolded and reprimanded for the indecent act. Since the appellant had then felt repentant for his bad behavior the matter was not reported to the police.

5- After the incident, informant Mahavir Singh Bisht got scribed the written report, Ext. Ka.1, from Sri J.P. Pandey and delivered it at the P.S. Haridwar at 8 A.M. On its basis F.I.R, Ext. Ka.3 was prepared and a case under Section 302 I.P.C. was registered against the culprits, vide G.D. Report No.11, Ext. Ka.6 Investigation of the case was taken up by S.H.O. Sri S.K. Tomar.

6- On receiving information for the hospital, Investigating Officer along with S.I. R.P. Pal and other police personnel reached there and directed S.I. R.P. Pal to held inquest on the dead body of Km. Deepa Bisht and he himself left for search of the culprits named in the F.I.R. S.I. R.P. Pal prepared inquest report, Ext. Ka.4 and relevant documents including the challan report, Ext. Ka.14 and packed and sealed the dead body and dispatched it for post mortem, which was conducted by Dr. N. Mehta at 3.30 P.M. on 14.8.1997. Appellant Ashok was arrested by the Investigating Officer at 1.30 P.M. on the day of the incident itself and in the presence of the witnesses, at the instant of the appellant steel ‘Sua’ was recovered from the bushes near a telephone pole by the side of the office of the Forest Department and which was found to be a lonely place,

vide memo Ext. Ka.19. Later on the investigation was handed over to S.I. V.K. Sharma, who on completion of the investigation submitted charge sheet, Ext. Ka.23, against the appellant Ashok @ Sameer and Rajan (accused). Rajan has been acquitted of the charge under Section 302/34 I.P.C. by the learned Sessions Judge. This is how the appeal has been preferred by one of the culprits, appellant Ashok @ Sameer.

7- The appellant had refuted the allegations of the prosecution and contended that the informant has intended to take forcible possession of the room in his tenancy and when the murder of informant's daughter was committed he was falsely implicated in the case.

8- At the trial the prosecution in order to prove its case has examined twelve witnesses. Constable Anil Kumar (P.W.11) was recalled for his examination and inadvertently he has been shown as P.W.13 in the record of the trial. Informant Mahavir Singh (P.W.1), Rajesh Lakhera (P.W.2), Sita Ram (P.W.8) and Devendra Singh (P.W.9) have been examined as eye witnesses of the occurrence. Satish Joshi (P.W.3) is a Panch witness of the inquest; Head Constable Anand Prakash (P.W.4) is a formal witness of preparation of check F.I.R. etc and the relevant G.D. Reports; Sri N.N. Rai (P.W. 5) was posted as Judicial Magistrate, Haridwar on 16-8-1997 and he was examined to prove the statement, Ext. Ka.13, of the appellant Ashok @ Sameer recorded under Section 164 of the Code of Criminal Procedure; S.I. R.P. Pal (P.W.6) was examined to prove the inquest held on the dead body of Km. Deepa Bisht and relevant documents; Dr. Deepak Kumar (P.W. 7) was examined to prove the injury report of witness Devendra Singh when he was examined at 10.30 A.M. on 14-8-1997 vide injury report, Ext. Ka.18 showing no external injury but he complained of pain in front of abdomen on both side inner aspects of it and on the back of right shoulder; Sardar Singh (P.W.10), a witness of recovery of steel 'Sua' on the discovery statement of the appellant and constable Anil (P.W.11) also to prove the factum of recovery of the said weapon of assault. Dr.

N.Mehta (P.W.12) conducted post mortem of the dead body of Km. Deepa Bisht at 3.30 P.M. on 14-8-1997 and prepared post mortem report, Ext. Ka.20. The following ante-mortem injuries were detected:-

1- Abrasion on left side of face 1cm X 0.2 cm from left eye.

2- Lacerated wound 1cm x 0.2cm X bone deep on left shoulder.

3- Lacerated wound 1cm x 0.2cm x bone deep on left shoulder.

4- Linear abrasion 2cm x 1.5cm below left shoulder.

5- Penetrating wound 0.3 cm x 0.3cm x deep chest cavity on breast left side, 3 cm from left nipple.

6- Abrasion 0.3cm x 0.2cm left side of neck.

7- Penetrating wound 0.3cm x .03 cm x bone deep on left shoulder.

8- Penetrating wound 0.3cm x 0.3cm x bone deep, margins were lacerated.

9- Penetrating wound 0.3cm x 0.3cm x bone deep on left upper side, 10 cm below from left shoulder.

10- Penetrating wound 10cm below left shoulder on upper arm, 0.3cm x bone deep.

11- Penetrating wound on back right side 0.3cm x 0.3cm x bone deep, below injury no.10.

9- On lateral examination lever, spleen and kidney were found congested. Rib under injury no.5 was fractured and pleura and lungs were also damaged. In the opinion of the Medical Officer the death was caused by shock and haemorrhage as a result of ante-mortem injury no.5 about half day ago.

10- This all is the evidence of the prosecution. No evidence was adduced in defence. Learned Sessions Judge in his judgment observed that the prosecution witness have on oath corroborated the prosecution story and the discrepancies and contradictions in the statements of the witnesses are not of serious nature and therefore came to a definite conclusion that

the murder of Km. Deepa Bisht has been committed by appellant Ashok @ Sameer and that the prosecution has failed to prove that the other accused Rajan also took part in the commission of the crime and the appellant alone was accordingly held guilty, convicted and sentenced as aforesaid.

11- We have heard Sri S.P.S. Panwar, learned Senior Counsel, Amicus Curiae for the appellant and the learned A.G.A. and have carefully considered the evidence on record and have gone through the judgment under appeal with the help of the learned counsel for the parties.

12- In the first instance the learned Amicus Curiae led us to the judgment under appeal and submitted that the same does not conform to the legal requirement of Section 354 of the Code of Criminal Procedure because the learned Sessions Judge has neither made critical analysis of the evidence of the prosecution nor gave any reason for the decision to believe the evidence of the witnesses and therefore on this count itself the judgment under appeal is liable to be set aside. We see no force in this argument because the appeal having been preferred by the convict and further the reference being made under Section 366 of the Code of Criminal Procedure, which legally is a continuation of the trial itself, the critical appreciation of the evidence of the prosecution can very well be made now also and merely on the said ground and judgment of conviction of the appellant can not be set aside.

13- Learned Amicus Curiae then referred to the evidence of alleged eye witnesses of the incident and vehemently argued that none of them have actually witnessed the occurrence and the learned Sessions Judge wrongly placed reliance on their evidence on the basis of invalid and improper conclusion that close relations are not expected to falsely implicate the real assailant and also on the ground that the discrepancies and contradictions in the statements of the witnesses are not of serious nature. On the other hand learned A.G.A. fairly submitted that the submission of the learned Amicus Curiae may be relevant only in regard to one of the four eye witnesses

viz. Sita Ram (P.W.8) who though claimed himself to be the eye witness of the actual incident gave out in cross-examination that when he reached at the spot, the victim Km. Deepa Bisht had already been shifted into a rickshaw in an injured state meaning there that she was not made to receive the injuries in his present, but the evidence of the other three eye-witnesses being trustworthy and reliable the learned Sessions Judge made no mistake or error of law in placing implicit reliance on their evidence to come to the conclusion that none other than the appellant Ashok was the author of the fatal injuries of the victim Km. Deepa Bisht. In our considered view the argument of the learned Amicus Curiae in the face of the evidence of the eye witnesses Mahavir Singh (P.W.1), Rajesh Lakehra (P.W.2) and Devendra Singh Bisht (P.W.9) can not e said to legally sustainable.

14- The reasons are that the incident took place during day light at about 7-15 A.M. and there is no dispute on the point that appellant Ashok was well known to these witnesses. Few days before the incident the appellant, according to P.W. 1 and P.W.9 has made un-complimentary and indecent remark by way to teasing the victim Km. Deepa Bisht and on her complaint the appellant was reprimanded and on the appellant's showing the gesture of begging to be forgiven for his act the matter was not reported to the police. Therefore, there could not have been any confusion in fixing the identity of the actual assailant of the victim at the time of the incident by these witnesses. Both these witnesses were not seriously cross-examined by the defence on this issue, which indicate that such an incident had infact taken place few days before the ill-fated incident of 14-8-1997 when the victim of the case was assaulted by the appellant. Here it also need to be stated that the claim of the witness Rajesh Lakhera (P.W.2) that he knew the appellant from before the incident was also not questioned in his cross examination by the defence. Therefore, this witness also could not have made any mistake in fixing the identity of the actual assailant.

15- All these three witnesses have been categorical in their assertion that appellant Ashok alias Sameer and his companion Rajan have cornered Km. Deepa Bisht in Jain Mandir lane in front of the Gurudwara while she was going with her school bag at about 7-15 A.M. on the day of the incident i.e. 14.8.1997 and thereafter on the exhortation of Rajan appellant Ashok started assaulting the said victim and before she could be rescued by her father P.W.1 and brother P.W.9, the appellant was able to take out steel 'Sua' and gave its blows also on various parts of her body causing serious injuries, resulting which she fell on the ground at that place. P.W. 1 Mahavir Singh and P.W.9 Devendra Singh, the father and brother respectively of the said victim, were then going to Roorkee to purchase sundry items and they in fact were following the victim, who was then going to school. Both these witnesses were confronted with their statements under Section 161 of the Code of Criminal Procedure to contradict their statement that on that day they were going Roorkee to make some purchases. The statement that they were going to Roorkee was not given to the Investigating Officer and merely on account of this omission highlighted by the learned Amicus Curiae , the otherwise reliable evidence of these witnesses could not be safely disbelieved. P.W.1 was an employee of the Roadways Transport Corporation and he categorically stated that on that day he was on leave. Therefore, his claim that he was going to make purchases on that day can not be viewed with any suspicion. It was also quite natural for him to ask his son P.W.9 to accompany him to Roorkee and if both the father and son were then going for the said purpose to Roorkee and happened to be near the place of the occurrence there was nothing unusual in it also.

16- Both P.W.1 and P.W.9 were also cross-examined at length with a view to show that in case they were to go to bus station from their house, they were supposed to prosecute a shorter route in which Jain Mandir Lane in front of Gurudwara, would not come across and both of them would not have any

occasion to be at the place of the occurrence at the time of the alleged occurrence on that day. Learned Amicus Curiae referred to those relevant parts of the evidence of both these witnesses and submitted that in fact it is highly doubtful that these witnesses have prosecuted the route from their house which lead to the place near Jain Mandir Lane and in a situation like this these witnesses were not expected to have witnessed the incident and later on after the occurrence they were falsely shown to be the eye witnesses of the occurrence in order to solve the blind murder of the victim and also to support the prosecution case as set up against the appellant and another. Having carefully perused the evidence of both these witnesses we see no force in this argument also because while the witnesses admit of two routes from their house to the bus stand, they categorically stated that they chose that route which pass in front of Gurudwara and near the Jain Mandir Lane where the occurrence took place. Not only this P.W.1, Mahavir Singh has also been categorically in saying that the two routes to the bus stand from his house are almost equal in distance and therefore in a situation like this, it can not be safely accepted that these witnesses were not likely to take up the route which is towards the Bilkeshwar Mandir situate in the north of their house and the road also shown and marked as Bilkeshwar road in the site plan, Ext. Ka.21. The Bilkeshwar road runs in front of Gurudwara and further towards the Jain Mandir Lane where the occurrence took place, as also depicted in the said site plan. In other words the evidence of these witnesses can not be taken to support the submission made by the learned Amicus Curiae that the witnesses were not expected to pass by the side of the place of the occurrence even while going to catch a bus from the bus stand for Roorkee on that day in order to reach there and made certain purchases.

17- It was next argued that the admission of both these witnesses that the victim Km. Deepa Bisht who sustained serious injuries at the scene of the incident was not shifted by them to the hospital and rather other people took her in a

rickshaw to hospital admit of an inference that these witnesses were not present at the scene of the incident. No doubt the occurrence having taken place in the presence of the father and brother of the victim, it was expected that the victim will be shifted to the hospital by them but we also can not loose site of the fact that in a situation like this the close relatives being grief-stricken do not find themselves to be so composed as to take sudden decision to themselves shift the victim to the hospital and it is also not uncommon that other people being conscious of the situation come forward to take the victim to the hospital at once so that medical aid may be provided to save the life of the victim. In this case also it is so happened as stated to by both these witnesses and the victim Km. Deepa Bisht soon after the accident was taken in a rickshaw by others to the hospital where she was unfortunately reported as brought dead. Therefore, merely because these witnesses themselves having not preferred to pick up the victim and take her to the hospital at once their behaviour would not detract from placing implicit reliance on their otherwise reliable evidence regarding the actual occurrence of assault made by the appellant in their presence. In a situation like this the informant P.W.1 was also not expected to verify the identity of those persons who took the victim to the hospital from the scene of the incident, even if the names of these persons such as Wilson peter and Subhash Peter were reported by the Medical Officer when the memo was sent to the police station and entry, Ext. Ka.10 was got to be made in the G.D. of that day, that is, 14-8-1997. There was nothing wrong in P.W.1 saying that he do not knew Wilson Peter who was later on told to be the conductor of a bus. In fact both P.W.1 and P.W.1 have also soon reached the hospital where the victim was taken by others from the scene of the incident and this was the reason that eye witness Rajesh Lakhera (P.W.2) affirmed their presence at the gate of the hospital when he also went there after witnessing the incident. This witness has stated that he had seen the father and brother of the victim Km. Deepa standing at the gate of the

hospital where large crowd has also assembled which was quite natural after the news of the incident of assault of a young girl gets currency in and around the locality and out of curiosity the residents rush to the hospital. In short the above factor highlighted with reference to the behavior of P.W. 1 and P.W.2 can not be taken to have any adverse telling effect on the credibility of their evidence.

18- Against eye witness Devendra Singh (P.W.9) it was also argued that in order to show his presence at the scene of the incident it was falsely alleged that he sustained injuries also at the hands of the assailants while making an attempt to rescue his sister Km. Deepa Bisht and to bring home the point of view attention was drawn to his medical examination report, Ext. Ka.18 and evidence of Dr. Pradeep Kumar (P.W.7) who prepared this report after medically examining the witness Devendra Singh Bisht. The Medical Officer has not found any eternal injury, but reported that the injured complained of plain in abdomen and on the back of right shoulder. Learned Amicus Curiae submitted that in fact the witness Devendra Singh had not received any injury and the medical evidence was procured with a view to affirm the false claim that he was present at the scene of the incident and was also assaulted. The witness Devendra Singh categorically stated that he received invisible injuries while he was trying to save his sister. P.W. 1 Mahavir Singh also corroborated his evidence and even stated that either of the two assailants had struck a brick on the person of his son resulting which the bone of the hand of the son was fractured. No doubt there is embellishment in the claim but it appear to be so in view of the Devendra Singh having complained of pain on the back of right shoulder as reported to by the medical officer in the injury report, Ext. Ka.18. Perhaps on that basis P.W.1 claimed that his son’s bone was fractured. At any rate the exaggeration which is not unusual even in the statement of a truthful witness can not be taken to detract from placing reliance on the evidence of the witnesses in regard to the actual occurrence.

19- To discredit the evidence of informant eye witness Mahavir Singh the learned Amicus Curiae referred to the F.I.R. of the case regarding which some confusing statement has been given by the informant eye witness, P.W.1. In examination-in-chief P.W.1 stated that he got scribed the written report Ext. Ka.1 at the hospital from J.P. Pandey on his dictation. In cross-examination he gave out that in the hospital J.P. Padey was one of the member of the public which had assembled there and that the written report was prepared on the basis of replies given by him to the questions put to him by Sub-Inspector of Police. At another occasion when the witness was cross-examined, he gave out that the name of the father of the appellant was asked by the Sub-Inspector when the report was got prepared at the dictation of the said Sub-Inspector of the Police at the Police Station. The witness also stated that he can make his signatures and can also read Hindi by clubbing the Hindi letters. He also stated that he is not a literate person. It is of significance that such a person who could only make his signatures and hardly read the Hindi language, was examined in the case of five different dates in a period of about four years. He was first of all examined on 23.1.1999; secondly on 22.8.2000; thirdly on 19-3-2001; fourthly on 12.2.2002 and lastly on 17-1-2003 and that too with the considerable gap of large number of months. His cross-examination continued on last four different dates with considerable gap. When the examination of even an educated witness would be taken in such a manner he too is expected to be confused in regard to various events pertaining to the incident what to think of a person who is not literate and can only make his signature in Hindi and read the Hindi language hardly by clubbing its letters. By lapse of time and loss of memory the informant Mahavir Singh was thus liable to be confused by searching and piercing examination again and again on various dates with considerable gap and this appear to be the reason that he went out to state that at the time of the preparation of the F.I.R. the Police Sub Inspector was also there and even the name of the father of the accused was inquired at

that time so that it could be mentioned in the F.I.R. Therefore, the infirmity so pointed out can not be safely taken to discredit the otherwise reliable evidence of the witness and it can not safely be accepted that the informant Mahavir Singh was not the eye witness of the occurrence and he was merely made to appear so on account of close relationship with the victim and that after deliberation the F.I.R. was fabricated to falsely rope-in the appellant and another in the case. In other words neither the evidence of the eye witness can be taken to be totally shaken on account of the above factor nor the F.I.R. of the case can be said to be a tainted document.

20- Here we found it advantageous to refer to the reported decision of the Apex Court in the matter of Dharmendrasinh alias Mansingh Ratansingh versus State of Gujarat; A.I.R. 2002 Supreme Court 1937 where the damaging effect on the prosecution case as a result of contradiction relating to the lodging of the F.I.R. was an issue. The facts of that case were that according to P.W.3 she had gone to the police station where enquiries were made from her by the police personnel and thereafter report was lodged on 24-8-1998 itself at 5 P.M. P.W.9, the Investigating Officer however, gave out that the complaint was given by P.W. 3 on the basis of which case was registered at the police station. The Hon'ble Judges of the Court observed that - no doubt there is definitely a contradiction about the lodging of the F.I.R. but the effect of such contradiction or discrepancy was in their opinion to be viewed in the light of the facts and circumstances of each case. It was observed that there may be cases where such a discrepancy may prove fatal to the prosecution case whereas in other cases it may not have the same effect. It was finally observed that the consequences of such discrepancy of defective or doubtful investigation is not necessarily only one leading to discredit the main prosecution case if the prosecution evidence inspires confidence and circumstances lead to such conclusion that the prosecution story rings true. As found here in the instant case on careful scrutiny of the evidence of P.W. 1 and the circumstances of the case the

discrepancy with reference to the F.I.R. or in any case to the investigation do not necessary lead to discredit the main prosecution case and its evidence in regard to the actual occurrence and which in fact appear fairly trustworthy worth placing reliance thereupon. Not only this witness P.W.1 but his son P.W. 9 happened to be there at the scene of the incident and saw that the victim Km. Deepa Bisht was assaulted by the appellant Ashok @ Sameer who even wielded a steel 'Sua' to cause its injuries on the person of the victim.

21- In short the evidence of both these witnesses being trust worthy was rightly accepted by the learned Sessions Judge to prove the manner of the occurrence in which the victim sustained fatal injuries at the hands of the appellant Ashok.

22- The other eye witness Rajesh Lakhera (P.W. 2) also corroborated the prosecution case. Drawing attention to his cross-examination that the witness went near the injured Deepa after making his way through a big crowd at the scene of the incident learned Amicus Curiae argued that the witness in fact had not seen the actual incident and at the most he reached there when the victim had already been assaulted and was lying there surrounded by large number of people. We see no substance in this argument because the witness claimed to have seen the actual incident from a short distance and stated that after receiving blows given by the appellant Ashok even by a steel 'Sua' the victim Km. Deepa fell on the ground where after large crowd assembled there at the scene of the incident. After the victim fell on the ground the witness had naturally curiosity to come close to the victim to fully acquaint himself as to how many injuries had been sustained by the victim while she was assaulted by the appellant and it was thus natural for the witness to make his way through the crowd and reach the actual site where the victim had fallen down after receiving the injuries on her person. Therefore, the manner in which the witness gave answer to the questions in the cross-examination would not admit of an inference that he had reached the scene of the incident when the assault had already been taken place.

We found nothing in the cross-examination of the witness as may entail rejection of his testimony. He stood the test of piercing cross-examination and in our view also he is a truthful witness and the learned Sessions Judge made no error or illegality in placing implicit reliance on his evidence also.

23- Reference to the statement of witness Sita Ram (P.W.8) has been made above. However his statement that when he reached at the scene of the incident had saw that the victim Km. Deepa was being put on a rickshaw in injured state corroborate the prosecution case in regard to the time and place of the incident which even otherwise had not been seriously disputed by the defence.

24- The learned Sessions Judge also placed reliance on the confessional statement of the appellant Ashok alias Sameer recorded under Section 164 of the Code of Criminal Procedure on 16-8-1997 by P.W.5, Sri N.N. Rai, the then Judicial Magistrate, Haridwar. Learned Amicus Curiae drew attention to the fact that the statement, Ext. Ka.13 was recorded on oath in contravention of the provision as laid down in Section 164 read with Section 281 of the Code of Criminal Procedure, and therefore no reliance could have been placed on it. Since oath was administered to the appellant, it was an illegality and as such the confessional statement lost its evidentiary value and the learned Sessions Judge made an error in accepting the same as admissible in proving the guilt of the appellant. This aspect however has no effect on the acceptability of the prosecution case in view of the reliable direct evidence of eye witnesses as discussed above. Similarly the evidence in regard to the recovery of steel ‘Sua’ vide memo Ext. Ka.19, at the pointing of the appellant Ashok has no legal worth in view of the definite statement of Panch witness Satish Joshi (P.W.3) who gave out that when the inquest was held on the dead body a steel ‘Sua’ was found lying there at that place. This also has no material bearing on the otherwise proved case of the prosecution based on the direct evidence in the case and as referred above.

25- The case was investigated by S.H.O. Sri S.K. Tomar who was not examined as a witness in the case. pointing out to this learned Amicus Curiae argued that the various aspects of the defective investigation could not be brought on record for want of examination of the Investigating Officer and since the cause of the appellant got prejudiced the benefit should have accrued to the appellant and the case of the prosecution should have been discarded by the learned Sessions Judge. We see no merit in this argument because we do not find that any prejudice had been caused to the appellant on account of the above factor. The contradictions in the statements of the witnesses were referred to in the cross-examination with the help of the documents of the prosecution supplied under Section 207 of the Code of Criminal Procedure and notice of which has also been taken by us while considering the credibility of the prosecution witnesses and we found that no prejudice had been caused to the appellant. It need to be stated that the Apex Court in the case of Raj Kishore Jha versus State of Bihar and others; 2003 A.I.R. S.C.W. 5095 (5101) laid down that mere non-examination of the I.O. does not in every case cause prejudice to the accused or effects the credibility of the prosecution version and we found that in the present case no prejudice had in fact been caused to the accused by non-examination of the Investigating Officer of the case.

26- For the reasons aforesaid, we are of the firm view that the direct evidence of the prosecution in the case has rightly been found reliable and acceptable by the learned Sessions Judge to prove that the appellant Ashok alias Sameer fatally assaulted the victim Km. Deepa Bisht in the incident and that he has been rightly held guilty of committing the offence under Section 302 I.P.C. We are however, of the view that this can not be considered to the rarest of the rare cases warranting the death penalty to the convict. No doubt every murder is a heinous crime, but the appellant in this case can not be placed in a categorically of a man who could be menace to the society so that he could be deprived of his life according to the procedure

established by law. Therefore, we do not find it to be a fit case of confirm the death sentence awarded by the learned Sessions Judge and instead the appellant deserve to be awarded lesser sentence provided under the law for the crime committed by him.

27- In the result this appeal partly succeeds. The conviction of the appellant Ashok @ Sameer under Section 302 I.P.C. is upheld. His death sentence is converted in to 'Rigorous Imprisonment of Life' together with fine of Rs. 5000/- (five thousands) as imposed by the trial Judge. In default he shall serve out further imprisonment for 15(fifteen) days.

28- In view of above the criminal reference No. 3/2003 is hereby rejected.

29- Let the record be sent back to the learned Sessions Judge for compliance.

(Rajesh Tandon, J.) **(Irshad Hussain, J.)**

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